

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.354 OF 2001

M/s Mars Services .. Appellant

versus

Bombay Gas Services .. Respondent

...

Mr. D.B. Patil for the appellant

Mr. Mahendra Moholkar i/b. C.V. Moholkar for
respondent.

CORAM : D.G. KARNIK, J

DATED :13th October, 2006

P.C.:

1. Heard counsel for the parties.

2. This appeal is directed against the judgement and order dated 22nd December, 2000 whereby the Civil Judge, senior division, Kalyan held that he had no territorial jurisdiction to entertain and try the suit filed by the appellant-plaintiff and returned the

plaint for presentation to the proper court.

3. The appellant filed a suit bearing Special Civil Suit No.2108 of 1996 against the respondent for recovery of Rs.2,92,000/-. The appellant carries on the business of sale of industrial gas which is sold in cylinders. The cylinders are given to the customer for free use for certain period after which the customer is required to pay rent. The respondent was one of the customers and distributor of the appellant. The appellant delivered to the respondent 45 cylinders filled with industrial gas. The respondent failed and neglected to return the cylinders hence the appellant filed a suit for recovery of the price of the cylinders.

4. In the plaint the appellant alleged that it had factory at Murbad, Taluka- Kalyan, Dist-Thane, written agreement was executed between the parties regarding the supply of gas and the cylinders in which the terms and conditions about return of the cylinders were recorded. The respondent kept deposit of Rs.25,000/- as refundable security deposit and the appellant agreed to supply industrial gas in cylinders. Cylinders were to be returned within the specified time

failing which the respondent was liable to pay the rent. According to the appellant he delivered 45 cylinders to respondent at Murbad which he failed to return. The appellant therefore filed the suit for recovery of 45 cylinders.

5. The respondent contested the suit on merits as well as on the ground that the court at Kalyan had no jurisdiction to entertain and try the suit. The respondent pleaded that the contract was executed at Vikroli. The appellant had come to the office of the respondent at Vikroli where the contract was executed. The respondent was carrying on business in industrial gas for many years. The appellant came to his office and stated that he recently started business and the respondent should take gas from him. Accordingly negotiations were held and the contract took place at Vikhroli. He further pleaded that cylinders were also delivered to the respondent at Vikhroli and no part of the cause of action had arisen at Murbad, Taluka-Kalyan. Therefore, according to him the Kalyan court had no jurisdiction.

6. Delivery challan under which 45 cylinders were given was produced in the court. A copy thereof is

also annexed at Exhibit B to the appeal memo. Counsel for the appellant placed reliance on condition no.5 printed on the delivery challn. Condition no.5 states that all disputes, if any, are subject to Murbad jurisdiction. Counsel for the appellant therefore submitted that the parties had specifically agreed that all disputes to be subject to the Murbad jurisdiction which came under the jurisdiction of the court at Kalyan. He therefore submitted that in view of this agreement court at Kalyan had jurisdiction to entertain and try the suit.

7. It is settled position of law that if two or more courts have jurisdiction to entertain and try a suit then the parties by contract can provide that only one of them shall have jurisdiction to entertain and try the suit to the exclusion of other. If such a condition is agreed between the parties then only the agreed court would have the jurisdiction to entertain and try the suit between the parties. The basic requirement however is that, at least a part of part of cause of action must arisen within the jurisdiction of that court. Parties cannot by an agreement provide that a court within whose jurisdiction no part cause of action arose would have the jurisdiction to entertain

and try the suit. Parties cannot by consent confer jurisdiction on a court which does not have one at all, to entertain and try the suit.

8. In my view therefore the appellant would be required to prove that some part of the cause of action arose at Murbad, within the jurisdiction of court at Kalyan for the applicability of the clauses printed on the delivery challan. The trial court has recorded a finding of fact that the agreement, Exhibit 30, of distributorship was not executed at Murbad. Trial court has also held that cylinders were not delivered to the plaintiff at Murbad. The trial court has given cogent reasons for these findings. The appellant in his cross examination has admitted that he has refilling facility at Kurla, Ghatkopar and also at Mulund, both suburbs of Mumbai. The respondent has his place of business at Vikhroli, another suburb of Mumbai. The distance between the defendant's place of business at Vikhroli and refilling center of the appellant at Kurla and Mulund is between 5 to 10 kilometers. As against that distance between Vikhroli and Murbad is 90 kilometers is no reason why the respondent would go all the way to Murbad for taking

delivery when the delivery could be available at Kurla or Mulund. The appellant employed two persons Akhtar Hussain and Himmat Ali as clerks in his Murbad Works. The appellant had cited them as witnesses for proving delivery at Murbad. However, none of them was examined as witness. The trial court therefore correctly drew an adverse inference against the appellant for not examining any of the said two witnesses who were in its employment. Thus the findings recorded by the trial court that the agreement was signed at Vikhroli and cylinders were also delivered at Vikhroli, are a finding of fact which are supported by evidence. As against that the appellant had not produced any evidence to show that either the contract was signed at Murbad or the delivery of the cylinders was effected at Murbad. Hence the finding must be confirmed.

9. Learned counsel for the appellant submitted that the defendant agreed to make payment at Murbad. There was no evidence before the trial court to show that the defendant had agreed to make payment at Murbad. Admittedly defendant paid security deposit of Rs.25,000/-. Appellant could have adduced evidence that this Rs.25,000/- were paid at Murbad. No such evidence was adduced. I am thus of the view that no

part of the cause of action arose at Murbad, within the jurisdiction of the court at Kalyan. Therefore, the decision of the trial court that it had no jurisdiction to entertain and try the suit, cannot be faulted.

10. For these reasons there is no merit in the appeal which is hereby dismissed with costs. The appellant- plaintiff is granted eight weeks time for collecting the plaint and for presenting it before the appropriate court.

11. Authenticated copy is allowed.

(D.G. KARNIK, J)